IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

WALT DISNEY PRODUCTIONS, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

SUMMARY OF ARGUMENT.

A. The Grievance and Arbitration Provision Contained in the Collective Bargaining Agreement Prevents the Discharge Issue From Burdening Interstate Commerce and Hence the Board Has No Jurisdiction Over This Proceeding.

1. The purpose and object of the Act was to remove obstacles to collective bargaining.

2. The corollary purpose and object of the Act was to compel collective bargaining agreements once reached

to be binding on both employer, the union and its members.

3. An employee is bound by the collective bargaining agreement made by his agent, the Union.

4. Only by compelling the Union and its members to abide by the collective bargaining agreement will the fundamental purpose of Congress be accomplished.

5. It is a wrong view of the Act to allow a grievance matter to be taken to the Board as an unfair labor charge rather than to settle it through the collective bargaining agreement's procedure for arbitrating grievances.

6. No substantial interference with or burden upon commerce is possible in a grievance over a discharge issue so long as the employer abides by its collective bargain.

7. The Board's jurisdiction does not attach unless the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 of the Act as to require its restraint in the public interest.

8. Proper interpretation of Section 10(a) of the Act denies the Board jurisdiction over a grievance involving a discharge issue where a collective bargain provides for arbitration of grievances.

B. The Purpose and Effect of Employee's Layoff Was Not to Discourage or Encourage Membership in Any Labor Organization Within Section 8(3) of the Act.

1. The Act, as interpreted by the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals, contrary to the holding of the Ninth Circuit Court of Appeals in the instant proceeding, requires that the Board make a finding, supported by substantial evidence, that both the *purpose*

and *effect* of a discriminatory discharge is to encourage or discourage membership in any labor organization.

2. The affirmative evidence in this case disproves any *purpose* or *effect* to encourage or discourage membership in any labor organization, in view of (i) the closed-shop agreement in effect at all material times, (ii) the fact that Babbitt is and was at all times a member of the Union, and (iii) the fact that there is no evidence in the record in support of the Board's finding on this issue.

C. The Board's Order Is Punitive Rather Than Remedial in Requiring Reinstatement of Babbitt Upon His Discharge From the Armed Services Without Imposing the Same Conditions and Limitations as Are Found in Section 8(b) of the Selective Training and Service Act.

1. Congress has established the legal obligation of re-employment of a former employee who has been drafted or has enlisted in the armed services, upon his discharge therefrom, and has imposed several conditions and limitations upon such duty of re-employment.

2. In fixing a different and more burdensome duty of reinstating Babbitt upon his discharge from the armed services in the instant case, the Board's order becomes punitive rather than remedial.

3. Under decisions of this Honorable Court, the power of the Board to command affirmative action is remedial and not punitive.

4. Hence, the Board's order is in error, and the Court's decision granting enforcement is likewise erroneous, in any event, in refusing to impose the same limitations and conditions upon petitioner's obligation of reinstating Babbitt after he is discharged from the armed services.

II.

BRIEF.

A. The Grievance and Arbitration Provision Contained in the Collective Bargaining Agreement Prevents the Discharge Issue From Burdening Interstate Commerce and Hence the Board Has No Jurisdiction Over This Proceeding.

1. The Purpose and Object of the Act Was to Encourage the Procedure of Collective Bargaining.

The preamble of the Act makes it plain that the driving force underlying the Act was the removal of obstructions to collective bargaining. The Congressional intent is found in the preamble of the Act in the following portions thereof:

> "the refusal by employers to accept the procedure of collective bargaining"

leads to unrest, burdening commerce.

> "Experiences prove that protection by law of the right of employees to organized and bargain collectively safeguards commerce from injury * * * by encouraging practices fundamental to the friendly adjustment of industrial disputes * * *."
>
> "it is hereby declared to be the policy of the United States"

to eliminate obstructions to commerce

> "by encouraging the practice and procedure of collective bargaining." (29 U. S. C. A., Sec. 151.)

This Honorable Court has announced this same purpose and object of Congress in establishing the Act.

In Phelps Dodge Corporation v. N. L. R. B. (1941), 313 U. S. 177, 186, Mr. Justice Frankfurter stated that:

> "Indisputably the removal of such obstructions [to collective bargaining] was the driving force behind the enactment of the National Labor Relations Act."

N. L. R. B. v. Fansteel Metallurgical Corporation (1939), 306 U. S. 240, 257, stated that:

> "* * * the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act."

2. Collective Bargaining Agreements, Once Effected, Should Bind Employer, Union and Employees Was the Purpose of Congress in Establishing the Act.

Compelling collective bargaining to the end that an agreement once reached would be binding upon the employer, the Union and each of its members was the corollary purpose of Congress.

N. L. R. B. v. Sands Manufacturing Company (1939), 306 U. S. 332, 342, states that:

> "* * * the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made."

3. The Employee Is Bound by the Collective Bargain Made by His Agent, the Union.

The employee appoints the Union his agent to bargain collectively with his employer. (*N. L. R. B. v. Mason Manufacturing Co.* (C. C. A. 9, 1942), 126 Fed. (2d)

810, 813.) He is bound by that contract to the same extent as if he had signed it personally. (*North American Aviation, Inc.* (Sept. 29, 1942), 44 N. L. R. B. 604, 611—reversed in 136 Fed. (2d) 898, but on other grounds.)

Instead of complying with the provisions of the collective bargaining agreement, requiring submission of his grievance to arbitration, the employee in this case, Babbitt, has renounced that procedure, has disregarded the collective bargain, and has filed an unfair labor charge with the Board. This he should not be permitted to do, so long as petitioner is ready and willing to abide by the grievance and arbitration provisions of the collective bargaining agreement.

Only by adopting and enforcing such a rule will the purpose and object of the Act to compel collective bargaining agreements binding on all parties be carried out.

4. Wrong View of the Act to Allow a Grievance Matter to Be Taken to the Board Rather Than to Settle It Through the Collective Bargaining Agreement's Procedure for Arbitrating Grievances.

We strongly urge that it is an entire misconception of the Congressional intent and language of the Act to permit a grievance matter to be taken directly to the Board as an unfair labor charge before even attempting to settle it in accordance with the collective bargain through arbitrating the grievance. Such a rule nullifies the collective bargaining agreement to that extent. It is entirely wrong, we submit.

5. No Substantial Interference With or Burden Upon Interstate Commerce Is Possible as Long as Petitioner Abides by Its Collective Bargain.

There can be no interference with or burden upon interstate commerce in a dispute case over a discharge issue, so long as petitioner performs its collective bargain. Instead of imposing a burden upon or interference with such commerce, petitioner stands ready and willing to follow the course of friendly adjustment of this industrial dispute. It is insisting that the controversy be peaceably settled in the manner to which the complaining witness agreed through his agent, the Union, in making the collective bargain containing the grievance and arbitration procedure.

Hence, as a matter of jurisdiction, there has been and can be no interference with or burden upon interstate commerce in this particular case. For that reason, the Board's order should be denied enforcement.

6. The Public Rights Created by Section 7 of the Act Must Be Substantially Interfered With, Requiring Restraint in the Public Interest, Before the Board's Jurisdiction Attaches.

The mere fact that a dispute involving a discharge issue has arisen is not of itself sufficient to vest the Board with jurisdiction when the employee has his remedy through a grievance and arbitration provision in a collective bargaining agreement binding upon him. Unless the alleged unfair labor practice interferes so substantially with the public rights created by Section 7 as to require its restraint

in the public interest, we submit that the Board has no jurisdiction over the matter.* We respectfully urge that the Court below was in error in adopting the Board's argument that any assertion of an unfair labor practice calls upon and requires the Board to enforce a public right. It seems obvious to us that no public right is substantially interfered with where a dispute has arisen as to the propriety of a layoff or discharge, but where the employer and employee have agreed in advance that they will be bound to arbitrate such dispute and where the employer stands ready and willing to carry out such arbitration. Certainly the parties are competent to agree to be bound to adjust such dispute peaceably and amicably through a

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*In a case relied upon by the Board in its brief before the Circuit Court of Appeals in this matter (*N. L. R. B. v. Newark Morning Ledger* (C. C. A. 3 (1941), 120 Fed. (2d) 262, 268, cert. denied (1941) 314 U. S. 693, 86 L. Ed. 554)), where there was *no* provision for arbitration of grievances, the Court there said that:

> "The jurisdiction is not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 as to require restraint in the public interest. As we have seen, the mere fact that a private right of an employee has been infringed by the act of an employer is not of itself sufficient to bring the Board's powers into play."

The only exception we take to the foregoing quotation as a correct statement of law is the phrase "in the opinion of the Board." While it is a matter for the Board's judgment in the first instance, we respectfully assert that before this Court will uphold the Board's jurisdiction, there must be substantial evidence to support the express or implied finding that the public rights have been so substantially interfered with as to require restraint in the public interest. We further respectfully assert that where, as here, the collective bargaining agreement provides for and requires arbitration of all grievances, and the employer is ready to arbitrate, there can be no substantial interference with the public rights requiring restraint by Court enforcement in the public interest.

grievance procedure leading up to arbitration. This is the very object of the Act. The public is in no way injured by such an agreement. Nor is there any right of the public that is invaded by allowing or compelling the parties to exhaust their grievance and arbitration procedure before calling upon the Board and the courts for relief. To the contrary, the public rights are more evidently protected by carrying out the Congressional intent of encouraging and fostering collective bargaining in requiring all parties to carry out the terms of their agreement.

7. The Grievance and Arbitration Procedure Affords an Adequate and Complete Remedy to the Employee.

The Board's order in a discriminatory discharge case simply requires that the employee be reinstated with back pay. *This is exactly what the arbitrator will do if he finds the discharge to be discriminatory.* The arbitrator will make the same order, if he so finds, to reinstate the employee with back pay. Furthermore, his award is enforcible by summary judgment in the State court.* Thus the Board order accomplishes nothing in the way of enforcing any supposed public right, or in the way of "punishing" the employer, which would not be accomplished, and to the same extent, by an arbitrator's award.

**Levy v. Superior Court* (1940), 15 Cal. (2d) 692, involved an arbitration under a collective bargaining agreement of a charge of discriminatory reemployment following a strike. The arbitrator found discrimination and ordered reinstatement. The California Supreme Court held the award entitled to summary judgment of confirmation under Code of Civil Procedure, Section 1287. This is the general rule followed in other states. See 15 Cal. (2d), at p. 700.

8. The National War Labor Board Has Adopted the Rule Here Contended for, That a Grievance and Arbitration Procedure Must First Be Exhausted Before That Board Will Take Jurisdiction, Even of a Discharge Issue.

War Labor Board decisions demonstrate that there is no public right interfered with which requires that Board to assume jurisdiction until available grievance and arbitration procedures are exhausted. That Board has announced the same rule, requiring exhaustion of arbitration procedure, even of disputes involving issues of claimed wrongful discharge.

Cudahy Bros. Co. (March 29, 1944), 14 Labor Relations Reporter 188;

Republic Steel Corp. (April 12, 1944), 15 W. L. R. 490;

Resolution of Regional War Labor Board IV, issued April 12, 1944, 15 W. L. R. XIV;

In re Texoma Natural Gas Co. (July 20, 1943), 12 U. S. L. W. 2099;

In re Carnegie-Illinois Steel Corp. (Jan. 28, 1944), 12 U. S. L. W. 2517.*

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*The War Labor Board cases are referred to by way of analogy only, it not being the contention of petitioner that they are other than merely persuasive of what the proper rule should be in connection with proceedings before the National Labor Relations Board.

9. The Proper Rule To Be Adopted by This Court Would Be One Similar to the Rule Adopted Where Administrative Remedies Are Available, Requiring the Complainant to Exhaust His Remedy of Arbitration Before Any Public Right Requires Protection by a Board Proceeding.

We respectfully suggest that the proper rule to be adopted by this Court, in cases where an existing collective bargaining agreement requires submission of all disputes through grievance and arbitration procedure, would be to require that the complaining party exhaust his remedy through the grievance and arbitration procedure before the Board may assume jurisdiction. This rule would then be identical with the rule requiring a party to exhaust available administrative remedies before resorting to court proceedings. Thus, and thus only, may the two paramount objects of the Act be accomplished, namely, the object of fostering and encouraging amicable settlement of industrial disputes through binding collective bargaining agreements, on the one hand, and, on the other hand, the protection of the public rights recognized by Congress in the Act.

10. Proper Interpretation of Section 10(a) of the Act Denies the Board Any Jurisdiction Where an Existing Collective Bargain Provides for Arbitration of Grievances.

The Court below adopted the view, urged by the Board, that Section 10(a) of the Act conferred exclusive jurisdiction upon the Board to the extent that the remedy of arbitration contained in the collective bargaining agreement must be disregarded.

Section 10(a) provides that:

> "This power [to prevent any person from engaging in any unfair labor practice affecting commerce] shall

be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (28 U. S. C. A., Sec. 169(a).)

The Board's argument, and likewise the decision of the Court below, overlooks the fundamental limitation upon the exclusive powers of the Board, namely, that the unfair labor practice must be one "*affecting commerce.*" Petitioner's position is that the grievance, *i. e.,* "the unfair labor practice," cannot "affect," and has not "affected," *burdened* or *interfered* with interstate commerce, so long as petitioner performs the collective bargain, and so long as this Honorable Court prevents the employee from refusing to abide by the collective bargain. Having this limitation in mind, it then becomes obvious that the Board does not have exclusive jurisdiction of this case where the collective bargain necessarily prevents the grievance from "affecting," burdening or interfering with interstate commerce. Hence, Section 10(a) does not stand in the way of the adoption by this Honorable Court of the rule of law which we submit to be the proper interpretation of the Act.

B. The Purpose and Effect of the Employee's Layoff Was Not to Discourage or Encourage Membership in Any Labor Organization Within Section 8(3) of the Act.

The rule adopted by the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals, interpreting Section 8(3) of the Act, requires that the Board make a finding which must be supported by substantial evidence that both the *purpose* and *effect* of a discriminatory discharge is to encourage or discourage membership in any labor organization.

N. L. R. B. v. Air Associates, Inc. (C. C. A. 2, 1941), 121 Fed. (2d) 586, 592, states that:

> "Section 8(3) requires that the discrimination in regard to tenure of employment *have both the purpose and effect of discouraging union membership.** The Board made a clear finding that the *purpose* of the discharge was to discourage membership in the union, and we think that finding was sufficiently supported by evidence. . . . *But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the Act, or findings from which such an effect might reasonably be inferred.* The reinstatement order is modified, therefore, to omit Rudolitz and Geoghegan."

Western Cartridge Co. v. N. L. R. B. (C. C. A. 7, 1943), 134 Fed. (2d) 240, cert. denied (1943) 320 U. S. 746, 88 L. Ed. 30;

Stonewall Cotton Mills v. N. L. R. B. (C. C. A. 5, 1942), 129 Fed. (2d) 629 at 632, cert. denied (1942), 317 U. S. 667, 87 L. Ed. 536;

Martel Mills Corp. v. N. L. R. B. (C. C. A. 4, 1940), 114 Fed. (2d) 624, 633.

The decision of the Ninth Circuit Court of Appeals in this proceeding adopts a different view and does not require that there be substantial evidence that both the *purpose* and *effect* of a discriminatory discharge is to encourage or discourage membership in any labor organization.

The language of Section 8(3) most certainly requires that the Board prove that the discriminatory discharge

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*Italics supplied unless otherwise indicated.

was done with the *purpose* and has the *effect* of encouraging or discouraging membership in any labor organization. The pertinent language of that section provides that:

> "It shall be an unfair labor practice for an employer—
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> • • •
>
> "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The section does not proscribe what might be loosely and generically described as a "discriminatory discharge on account of union activities." It must be discrimination "to encourage or discourage membership" in a labor organization. This requires that the discrimination be practiced with the *purpose* and that it have the *effect* of encouraging or discouraging union membership.

In the instant proceeding, we urge that there is no evidence whatsoever that either the *purpose* or the *effect* of Babbitt's layoff, which the Board found to constitute a discriminatory discharge, was to encourage or discourage membership in any union. There is nothing whatsoever in the record from which any reasonable inference of such purpose or effect may be drawn.

The undisputed evidence shows a collective bargaining agreement with a closed-shop provision requiring petitioner to employ only members of the Union. Such collective bargaining agreement has been in effect at all material times and continues in effect at the present. Babbitt himself has at all times remained a member of the Union. It is, therefore, inconceivable that his layoff could have been made with the *purpose* or especially could in any way

have the *effect* of encouraging or discouraging either Babbitt or any other person from either joining or leaving the Union or any other labor organization, or in refraining from taking any part whatsoever in the Union or in any collective bargaining process. Certainly there is no evidence whatsoever in this record, and there could be none, that anyone was discouraged or encouraged in joining or leaving the Union, or any other union, or carrying on any collective bargaining process as a result of Babbitt's layoff.

The Board argued, and the Court below adopted its argument, that there were *hypothetical* and *speculative* discouragements of union membership as a result of Babbitt's layoff. For example, the Board argued, and the Court followed the argument, that (i) union membership of groups of employees not covered by the closed-shop contract in question "*would be deterred*" by a show of hostility on petitioner's part, (ii) employees included within the instant closed-shop contract "*might cease*" their efforts to obtain its periodic renewals, and (iii) all employees "*might deem it wise*" to forego all active part in Union affairs. [R. 1388-1389.]

We respectfully urge that the *hypothesis* and *speculation* as to what groups of employees not covered by the closed-shop contract *would be* deterred from doing, or that Union members *might* cease efforts to obtain renewals of the collective bargaining agreement, or that Union employees *might* deem it wise to forego Union activities, does not constitute a rational inference from any evidence in the record. It is sheer guesswork. It has no probative basis in the record. It cannot constitute substantial evidence in support of the Board's implied finding that the purpose

and effect of the claimed discriminatory discharge was to encourage or discourage membership in any labor organization.

This, alone, requires a reversal of the Board's order. This necessarily follows, since the Court below has specifically decided that the Board's order cannot be supported under Section 8(1) as an unfair labor practice with respect to petitioner's employees generally. [R. 1389-1391.] Since the case must stand or fall as a Section 8(3) case, the lack of evidence to support the essential finding concerning purpose and effect is fatal to the case.

C. The Board's Order Is Punitive Rather Than Remedial in Requiring Reinstatement of Babbitt Upon His Discharge From the Armed Services, Without Imposing the Same Conditions and Limitations as Are Found in Section 8(b) of the Selective Training and Service Act.

Where an employee is drafted or enlists in the armed services and is discharged therefrom, Congress has imposed a duty of reinstatement of such employee. (*Section 8(b) of the Selective Training and Service Act,* as amended, 50 U. S. C. A., Appendix, Section 308(a), (b), (c).) Pertinent portions of the Selective Training and Service Act of 1940 are set forth in the Appendix attached to this Brief.

This duty of re-employment of a former employee discharged from the armed forces is dependent upon several conditions and limitations. Among them are the following:

(i) The former employee must complete his period of training and service "satisfactorily" in the judg-

ment of those in authority over him and obtain a certificate to that effect, *i. e.*, he must have an honorable discharge;

(ii) The former employee must be still qualified to perform the duties of the position he left in order to perform such training and service;

(iii) The former employee must make application for re-employment within ninety (90) days after he is relieved from such training and service; and

(iv) If he was formerly in the employ of a private employer, such employer's circumstances must not have so changed as to make it impossible or unreasonable to restore him to the same position or to a position of like seniority, status and pay.

A comparison of the Board's order for reinstatement of Arthur Babbitt by petitioner with the foregoing provisions of Section 8(b) shows that the Board did not qualify and limit the order of reinstatement of this employee upon termination of his training and service in the armed forces. For purposes of comparison, in this respect, the Board's order reads as follows:

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Upon his application within forty (40) days after his discharge from the armed forces of the United States, offer Arthur Babbitt immediate and full reinstatement of his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges;" [R. 115.]

Thus it is seen that the Board's order omits three of four conditions of Section 8(b) above outlined in fixing its order of reinstatement of this employee.

In fixing an entirely different and more burdensome duty and enlarging and enhancing the rights of the former employee, the Board's order becomes punitive rather than remedial and therefore is plainly in error. The Board has no power to make a punitive order by imposing a heavier duty of reinstatement than that which Congress has established.* The legal obligation of re-employment of an employee who has gone into the armed forces has been fixed by Congress. Apart from this Congressional legislation, there would be no legal obligation of re-employment. The former employee's legal rights extend no further than the provisions of Section 8(b). The legal duty of the former employer is fixed by that standard. It is obvious that an employee leaving his private employment upon enlisting would have no legal right to compel his re-employment upon receiving his discharge, were it not for the provisions of the Selective Training and Service Act or a similar Congressional enactment. Hence, the former employee in this case has only such legal rights of re-employment by petitioner as are fixed by the Act of Congress. Since the Board's order imposes a heavier duty than that announced in the Act of Congress, the order is to that extent punitive, and not remedial.

**Consolidated Edison Co. v. N. L. R. B.* (1938), 305 U. S. 197, 236, states that: "The power [of the Board] to command affirmative action is remedial, not punitive. . . ."

To make the point more vivid, the Court may judicially know that over 100 of petitioner's employees have gone into the armed services, of whom a large number have rights of reinstatement in accordance with Section 8(b) of the Selective Training and Service Act. Babbitt, under the Board's order, is placed in a much more favorable position as to his right of reinstatement when he is discharged from the armed forces than this large number of former employees who also have gone into the armed forces. Since this former employee is rendering full-time services to the Government and will continue to do so for an indefinite period of time, possibly running into a matter of several years, it is only right and just that the legal duty of reinstating him be exactly the same as that for the reinstatement of all petitioner's other former employees who have gone into the armed services. As an example, if any of the other employees fails to obtain an honorable discharge from the armed services, he has no right of reinstatement by petitioner, whereas, regardless of the nature of the discharge of this employee, under the Board's order, he has a legal right to be reinstated.

We strongly urge that the Board's order be modified in the event this Honorable Court does not entirely reverse the order on the other grounds urged by petitioner, so as to incorporate each of the conditions of Section 8(b) as above pointed out.

Conclusion.

We urge that the Petition for Certiorari be granted on the grounds that the Circuit Court of Appeals' enforcement of the Board's order in this proceeding erroneously decided important questions of law involving the proper administration of the National Labor Relations Act.

Respectfully submitted,

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